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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/622,803	07/21/2003	Rudolf Bertagnoli	P07878US00/MP	3480
881	7590	09/08/2005	EXAMINER	
STITES & HARBISON PLLC 1199 NORTH FAIRFAX STREET SUITE 900 ALEXANDRIA, VA 22314			REIMERS, ANNETTE R	
			ART UNIT	PAPER NUMBER
			3732	

DATE MAILED: 09/08/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/622,803

Applicant(s)

BERTAGNOLI, RUDOLF

Examiner

Annette R. Reimers

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 18 August 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) 4,13 and 15-21 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3,5-12 and 14 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 21 July 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>05/04/04, 06/21/05</u> | 6) <input type="checkbox"/> Other: _____  |

**DETAILED ACTION*****Election/Restrictions***

Applicant's election with traverse of invention I, claims 1-14 and 19-21, Species I, figure 2, and Subspecies I, figure 1, in the reply filed on August 18, 2005 is acknowledged. The traversal is on the ground(s) that figures 11 and 12 are multiples of figure 2 and are not believed to be separate species. This is not found persuasive because figures 11 and 12 are multiples of figure 2, therefore, they are considered to be patentably distinct species. Regarding figure 10, examiner agrees with applicant that figure 10 shows a different retaining structure and not a different frame.

It is further acknowledged that applicant believes that claims 1-3, 5-14 and 19-21 read on the elected Species. The examiner agrees with the applicant regarding all claims except claims 13 and 19-21. The elected retaining frame, Species I, Figure 2, does not include three anchor screws securable to three adjacent vertebrae, the frame member having three arms, each having a tube engaging one of the anchor screws. In addition, the elected retaining structure, Subspecies 1, figure 1, does not include a retaining structure that is a non-threaded securing structure,

Claims 4, 13 and 15-21 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected species, there being no allowable generic or linking claim.

The requirement is still deemed proper and is therefore made FINAL.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1 and 5-8 and 12 are rejected under 35 U.S.C. 102(e) as being anticipated by Patel et al. (U.S. Patent Number 2004/0204710).

Patel et al. discloses an instrument for spreading at least two adjacent vertebrae and/or retaining at least two adjacent vertebrae in a spaced apart condition, a frame member comprising at least two arms, 14 and 16, each arm having a tube, e.g. 24, 26, 28 or 30, a connecting member, 12, connecting the arms for movement of the arms toward and away from each other and teaches that a plurality of anchor screws and retaining structures may be incorporated in the tubes (see figure 2 , paragraph 0024, and paragraph 0031).

In a further embodiment, the connecting member comprises a connecting bar having two telescopic members, one arm connected to each of said telescopic members, such that telescopic movement of one of the telescopic members relative to the other causes the arms to move toward and away from each other. The inner of the two telescopic members being a toothed rod and the outer of the two telescopic members having a toothed wheel fixed thereto which engages the toothed rod for

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moving the two telescopic members relative to each other. A releasable catch is mounted on the outer of the telescopic members and engaging the teeth on the inner of the telescopic members for permitting free movement of the two telescopic members relative to each other in one direction but stopping movement of the two telescopic members relative to each other in the other direction.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 2-3, 9-11 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Patel et al. (U.S. Patent Number 2004/0204710) in view of Michelson (U.S. Patent Number 5,039,194).

Patel et al. discloses the claimed invention except for the retaining structure engaging the rear end of the anchor screw and securely tightening it against the rear end of the tube and the retaining structure comprises a threaded nut, which threadedly engages the rear end of the anchor screw. Michelson discloses an instrument for spreading at least two adjacent vertebrae and/or retaining at least two adjacent vertebrae in a spaced apart condition the use of a threaded knob, 42 and 44, to prevent movement of the anchors and to fix the anchors relative to the arms (see column 3, lines 32-37). It would have been obvious to one skilled in the art at the time the invention was made to construct the device of Patel et al. having the retaining structure

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engaging the rear end of the anchor screw and securely tightening it against the rear end of the tube and the retaining structure comprises a threaded nut, which threadedly engages the rear end of the anchor screw, in view of Michelson, in order to prevent movement of the anchors and to fix the anchors relative to the arms.

***Conclusion***


The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. See PTO 892 for art cited of interest.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Annette R. Reimers whose telephone number is (571) 272-7135. The examiner can normally be reached on Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571) 272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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EDUARDO C. ROBERT  
PRIMARY EXAMINER